

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 ROMMIE MOSS,

10 Petitioner,

11 vs.

12 DWIGHT NEVENS, *et al.*,

13 Respondents.

Case No. 2:14-cv-01451-JCM-NJK

14
15 **ORDER**

16 This is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a
17 Nevada state prisoner. Petitioner challenges his state conviction of two counts of attempted murder
18 with the use of a deadly weapon, and one count each of discharging a firearm out of a motor vehicle
19 and discharging a firearm at or into a structure. (Exhibit 19).¹ Pending before the court is
20 respondents' motion to dismiss the petition because it was untimely filed. (ECF No. 17).

21 The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the statutes
22 controlling federal habeas corpus practice to include a one-year statute of limitations on the filing of
23 federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute
24 provides:

25 (d)(1) A 1-year period of limitation shall apply to an application
26 for a writ of habeas corpus by a person in custody pursuant to the
judgment of a State court. The limitation period shall run from
the latest of—

27
28 ¹ The exhibits referenced in this order are found in the court's record at ECF Nos. 18-20.

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d).

For purposes of the AEDPA limitations period, “a judgment becomes ‘final’ in one of two ways – either by the conclusion of direct review by the highest court, including the United States Supreme Court, to review the judgment, or by the expiration of the time to seek such review, again from the highest court from which such direct review could be sought.” *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001). “[W]hen a petitioner fails to seek a writ of certiorari from the United States Supreme Court, the AEDPA’s one-year limitations period begins to run on the date the ninety-day period defined by Supreme Court Rule 13 expires.” *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). United States Supreme Court Rule 13.1 provides that a petitioner has ninety days from the entry of judgment or entry of an order denying rehearing, within which to file a petition for certiorari. Sup. Ct. R. 13.1. Rule 36(a) of the Nevada Rules of Appellate Procedure states that “[t]he filing of the court’s decision or order constitutes entry of the judgment.” Where a petitioner pursues a direct appeal to the state’s highest court but declines to pursue a petition for writ of certiorari with the United States Supreme Court, the petitioner’s conviction becomes final upon the expiration of the time to file a petition for writ of certiorari. *See Jimenez v. Quarterman*, 555 U.S.

1 113, 119 (2009). Once the judgment of conviction becomes final, the petitioner has 365 days to file
2 a petition for relief under 28 U.S.C. § 2254, with tolling of the time for filing during the pendency
3 of a properly filed application for State post-conviction or other collateral relief regarding the same
4 conviction. 28 U.S.C. § 2244(d).

5 In the instant case, the judgment of conviction was entered on September 28, 2009. (Exhibit
6 19). The Nevada Supreme Court's order of affirmance on direct review was filed on July 19, 2010.
7 (Exhibit 24). The Nevada Supreme Court denied the petition for rehearing by order filed November
8 5, 2010. (Exhibit 26). Because petitioner did not file a petition for writ of certiorari to the United
9 States Supreme Court, his conviction became final on February 3, 2011, which is ninety days after
10 the Nevada Supreme Court filed its order denying the petition for rehearing. The AEDPA statute of
11 limitations began to run on February 4, 2011.

12 On September 29, 2011, when petitioner filed his state habeas petition, 237 days of untolled
13 time for filing a federal petition had elapsed. (Exhibit 28). The AEDPA limitations period was
14 statutorily tolled until petitioner's state habeas petition and appeal from the denial of his petition
15 was resolved by the Nevada Supreme Court. *See* 28 U.S.C. § 2244(d)(2). On December 12, 2012,
16 the Nevada Supreme Court entered an order affirming the denial of petitioner's post-conviction state
17 habeas petition. (Exhibit 35). Remittitur was issued on January 7, 2013. (Exhibit 37). The period
18 of statutory tolling under 28 U.S.C. § 2244(d)(2) ended with the Nevada Supreme Court's issuance
19 of remittitur on January 7, 2013. The AEDPA statute of limitations began to run again on January
20 8, 2013, and expired 128 days later, on May 16, 2013.

21 Pursuant to the "mailbox rule," federal courts deem the filing date of a document as the date
22 that it was given to prison officials for mailing. *See Houston v. Lack*, 487 U.S. 266, 270 (1988).
23 The federal habeas petition indicates that the petition was dispatched (given to prison staff for
24 mailing) to this court on August 3, 2014. (ECF No. 11, at p. 1, item 5). The federal petition was
25 filed untimely on August 3, 2014, which was 444 days after the expiration of the AEDPA statute of
26 limitations.

27 In his opposition to the motion to dismiss, petitioner asserts that the untimeliness of his
28 federal petition should be excused because he is actually innocent. (ECF No. 25). A federal habeas

1 petitioner may overcome the expiration of the AEDPA statute of limitations by making a showing of
 2 actual innocence, allowing the court to review the petition on the merits. *McQuiggin v. Perkins*,
 3 133 S.Ct. 1924, 1928-35 (2013); *see also Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011). When an
 4 otherwise time-barred habeas petitioner “presents evidence of innocence so strong that a court
 5 cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was
 6 free of non-harmless constitutional error,” the court may consider the petition on the merits. *See*
 7 *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Under *Schlup*, a petitioner may overcome a procedural
 8 default or expiration of the statute of limitations by (1) producing “new reliable evidence [of
 9 innocence] – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or
 10 critical physical evidence – that was not presented at trial,” *Schlup*, 513 U.S. at 324, and (2)
 11 showing “that it is more likely than not that no reasonable juror would have convicted him in light
 12 of the new evidence.” *Id.* at 327. The *Schlup* standard permits review only in the “extraordinary”
 13 case. *Id.* at 324. The Supreme Court has cautioned that “tenable actual-innocence gateway pleas
 14 are rare.” *McQuiggin*, 133 S.Ct. at 1928. “[A] petitioner does not meet the threshold requirement
 15 unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably,
 16 would have voted to find him guilty beyond a reasonable doubt.” *Id.* (citing *Schlup*, 513 U.S. at
 17 329); *see also House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is
 18 demanding and seldom met).

19 In the instant case, although petitioner alleges within his federal petition that he is innocent,
 20 petitioner has not alleged the existence of any new reliable evidence of innocence; therefore, he
 21 cannot pass through the *Schlup* actual innocence gateway to allow this court to reach the merits of
 22 his petition. Petitioner’s broad and conclusory allegations of innocence are insufficient to allow this
 23 court to consider the merits of his time-barred claims. The petition must be dismissed as untimely.

24 District courts are required to rule on the certificate of appealability in the order disposing of
 25 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and
 26 request for certificate of appealability to be filed. Rule 11(a), Rules Governing Section 2254 Cases
 27 in the United States District Courts. In order to proceed with his appeal, petitioner must receive a
 28 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*

1 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550,
2 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial showing of the denial of a
3 constitutional right” to warrant a certificate of appealability. *Allen*, 435 F.2d at 748; 28 U.S.C. §
4 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that
5 reasonable jurists would find the district court’s assessment of the constitutional claims debatable or
6 wrong.” *Allen*, 435 F.2d at 951 (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold
7 inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of
8 reason, that a court could resolve the issues differently, or that the questions are adequate to deserve
9 encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this court’s
10 dismissal of the petition as untimely debatable or wrong. The court therefore denies petitioner a
11 certificate of appealability.

12 **IT IS THEREFORE ORDERED** that respondents’ motion to dismiss (ECF No. 17) is
13 **GRANTED**.

14 **IT IS FURTHER ORDERED** that this action is **DISMISSED WITH PREJUDICE** as
15 untimely.

16 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
17 **APPEALABILITY**.

18 **IT IS FURTHER ORDERED** that the clerk of court **SHALL ENTER JUDGMENT**
19 **ACCORDINGLY**.

20 DATED September 7, 2016.

21

22

23

24

25

26

27

28

James C. Mahan
UNITED STATES DISTRICT JUDGE